United States Department of Labor
Employees' Compensation Appeals Board

K.N., Appellant	)	
and	)	**Docket No. 09-577**
	)	**Issued: October 14, 2009**
DEPARTMENT OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION, Price, UT, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 29, 2009 appellant filed a timely appeal of the Office of Workers' Compensation Programs' schedule award decision dated December 3, 2008. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(e), the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant met his burden of proof in establishing that he had a ratable hearing loss entitling him to a schedule award.

FACTUAL HISTORY

On July 31, 2008 appellant, then a 63-year-old mine and safety health training specialist, filed an occupational disease claim alleging that he sustained hearing loss in both ears due to high noise levels in the performance of duty. He first became aware of his hearing loss and related it to his employment on July 14, 2008. Appellant did not stop work.

On August 6, 2008 the Office requested additional evidence. Appellant submitted a statement dated August 12, 2008 in which he described his position at the employing establishment which began on July 14, 2003 and the noise exposure associated with that position. He also listed the various non-Federal Government positions he held between 1966 and 2003 and noted the various sources of noise exposure during that period. Appellant noted that his hearing problems consisted of difficulty hearing people talk and listening to the television. Additionally, he submitted several audiograms and corresponding reports dated between June 23, 2003 and August 3, 2008.

The submitted audiometric and medical evidence included a July 2, 2008 report from Dr. John McNamara, Board-certified in occupational medicine, who noted abnormal test results with severe hearing loss in both ears. He noted the baseline audiogram was from June 23, 2003 and advised that the baseline be reset to June 30, 2008. Dr. McNamara attached a June 24, 2008 audiogram performed on his behalf which showed the following decibel losses at frequencies of 500, 1,000, 2,000 and 3,000 hertz (Hz): 0, 5, 5 and 40 for the right ear and 0, 10, 30 and 55 for the left ear. In an August 3, 2008 report, he compared the audiograms from June 23, 2003 and June 24, 2008. Dr. McNamara indicated that both audiograms showed no impairment in either ear. He further found that, although there was a threshold shift likely due to noise exposure to the right ear in 2008, there was no hearing impairment in either ear pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001). Dr. McNamara also calculated impairment under other standards for evaluating hearing loss.

On October 17, 2008 the Office referred appellant, together with a statement of accepted facts, to Dr. Craig Anderson, a Board-certified otolaryngologist, for a second opinion evaluation.

In an October 31, 2008 report, Dr. Anderson noted that appellant had worked for five years in mine safety and already had some years of prior mine work and noise exposure. He further noted that appellant's hearing had deteriorated further within the last five years. Dr. Anderson indicated that, at the beginning of appellant's employment, his hearing was significantly down in the 3,000 to 6,000 Hz range. He compared the present audiometric findings to those at the beginning of appellant's exposure and found that his hearing had come down further at 2,000, 3,000 and 6,000 Hz over five years and such hearing loss was different than what was expected purely from presbycusis. Dr. Anderson opined that appellant's exposure was sufficient in intensity and duration to cause hearing loss, although no decibel levels were provided. He noted that other relevant factors consisted of smoking, mild cholesterol elevation, and significant shooting and hunting. Upon examination, Dr. Anderson found appellant's canals and drums were without noticeable loss. He also noted that he could not rule out acoustic neuroma explaining that appellant's hearing on the left was worse on pure tones and discrimination as a result of shooting and workstation orientation. Dr. Anderson diagnosed bilateral high frequency sensorineural hearing loss due to noise exposure at the employing establishment given the pattern of hearing loss and the history of many years of noise exposure in underground mine situations. He recommended hearing aids "if or when" appellant struggled with communication. Dr. Anderson also advised continuous careful noise protection and prevention. An October 31, 2008 audiogram performed on Dr. Anderson's behalf showed the following decibel losses at frequencies of 500, 1,000, 2,000 and 3,000 Hz: 5, 10, 10 and 45 for the right ear and 10, 10, 25 and 55 for the left ear.

On November 14, 2008 an Office medical adviser reviewed Dr. Anderson's October 31, 2008 report and the audiometric data obtained by him. He noted that the date of Dr. Anderson's report was the date of maximum improvement. The Office medical adviser applied Dr. Anderson's audiometric data to the Office's standard for evaluation of hearing loss and determined that appellant had a zero percent monaural hearing loss in the right ear and a zero percent monaural hearing loss in the left ear. He concluded that appellant had a zero percent binaural hearing loss. Regarding hearing aids, the Office medical adviser indicated that there was no medical need for amplification noting that appellant had excellent hearing in normal speech thresholds.

On December 3, 2008 the Office accepted appellant's claim for binaural hearing loss and indicated that hearing aids were not authorized. In a decision of the same date, it denied appellant's schedule award claim and hearing aids, finding that his hearing loss was not severe enough to be considered ratable and that he would not benefit from hearing aids.

LEGAL PRECEDENT

The schedule award provision of the Federal Employees' Compensation Act[1] and its implementing regulations set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sound discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the Office for evaluating schedule losses and the Board has concurred in such adoption.[2]

The Office evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*. Using the frequencies of 500, 1,000, 2,000 and 3,000 Hz, the losses at each frequency are added up and averaged. Then, the "fence" of 25 decibels is deducted because, as the A.M.A., *Guides* points out, losses below 25 decibels result in no impairment in the ability to hear everyday speech under everyday conditions. The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss. The binaural loss is determined by calculating the loss in each ear using the formula for monaural loss; the lesser loss is multiplied by five, then added to the greater loss and the total is divided by six to arrive at the amount of the binaural hearing loss. The Board has concurred in the Office's adoption of this standard for evaluating hearing loss.[3]

[1] 5 U.S.C. §§ 8101-8193.

[2] *R.D.*, 59 ECAB ___ (Docket No. 07-379, issued October 2, 2007); *Bernard Babcock, Jr.*, 52 ECAB 143 (2000).

[3] *E.S.*, 59 ECAB ___ (Docket No. 07-1587, issued December 10, 2007); *Donald Stockstad*, 53 ECAB 301 (2002), *petition for recon. granted* (*modifying prior decision*), Docket No. 01-1570 (issued August 13, 2002).

ANALYSIS

Appellant submitted a schedule award claim for hearing loss and the Office developed the claim by referring him to Dr. Anderson. On October 31, 2008 Dr. Anderson examined appellant and audiometric testing was performed on the doctor's behalf. He opined that noise exposure at appellant's workplace was sufficient to cause bilateral high frequency sensorineural hearing loss. Dr. Anderson did not indicate that appellant currently needed hearing aids.

An Office medical adviser applied the Office's standard procedures to the October 31, 2008 audiogram. It tested decibel losses at 500, 1,000, 2,000 and 3,000 Hz and recorded decibel losses of 5, 10, 10 and 45 respectively in the right ear. The total decibel loss in the right ear is 70 decibels. When divided by 4, the result is an average hearing loss of 17.5 decibels. The average loss of 17.5 is reduced by the fence of 25 decibels to equal 0, which when multiplied by the established factor of 1.5, resulted in 0 percent impairment of the right ear. The audiogram tested decibel losses for the left ear at 500, 1,000, 2,000 and 3,000 Hz and recorded decibel losses of 10, 10, 25 and 55 respectively for a total decibel loss of 100 decibels. When divided by 4, the result is an average hearing loss of 25 decibels. The average loss of 25 decibels is reduced by the fence of 25 decibels to equal 0, which when multiplied by the established factor of 1.5, resulted in 0 percent impairment of the left ear. The medical adviser also found that there was no medical need for hearing aids, noting that appellant had excellent hearing in normal speech thresholds. The Board finds that the Office medical adviser properly applied the standards to the findings of the October 31, 2008 audiogram and concluded that appellant did not have a ratable hearing loss for schedule award purposes.

The Board notes that appellant submitted audiograms and reports from Dr. McNamara dated between June 23, 2003 and August 3, 2008. As noted, Dr. McNamara indicated in his August 3, 2008 report that the audiograms he reviewed were not ratable under the A.M.A., *Guides*.[4] While he noted impairment under other standards for evaluating hearing impairment, the Office uses the A.M.A., *Guides*, as its standard in evaluating hearing loss for schedule award purposes.[5] Consequently, the Board finds that the weight of the medical evidence establishes that appellant has no ratable loss of hearing pursuant to the A.M.A., *Guides*.

CONCLUSION

The Board finds that appellant does not have a ratable hearing loss for schedule award purposes.

[4] *See Joshua A. Holmes*, 42 ECAB 231 (1990) (when several audiograms are in the case and are made within approximately two years of each other and are submitted by more than one specialist, the Office should have all of such audiograms evaluated to determine the percentage loss of hearing shown by each). Although the Office medical adviser did not specifically address the June 24, 2008 audiogram reviewed by Dr. McNamara, any error is harmless since the June 24, 2008 audiogram does not show a ratable hearing loss pursuant to the Office's standards for rating hearing loss.

[5] *Supra* note 3.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated December 3, 2008 is affirmed.

Issued: October 14, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board